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In the Supreme Court of the United States

OCTOBER TERM, 1958

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

FRED N. ACKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

FRED N. ACKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 36a–41a) are not officially reported. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 10–21) is reported at 258 F. 2d 568. The opinion of the Court of Appeals on the petitions for rehearing (Appendix A, *infra*, pp. 22–25) is reported at 258 F. 2d 575.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1958. (Appendix A, *infra*, p. 21.)

The petitions for rehearing were denied on September 3, 1958. (Appendix A, *infra*, pp. 22–25.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Where a taxpayer fails to file any declaration of estimated income tax as required by Section 58 of the Internal Revenue Code of 1939, whether the Commissioner may impose an addition to the tax under Section 294 (d) (2) of the 1939 Code for substantial underestimation of tax, as well as an addition under Section 294 (d) (1) (A) for failure to file a declaration.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Sections 58, 59, 294 (d) (1) and (2) of the Internal Revenue Code of 1939 and Section 29.294–1 of Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939, are set forth in Appendix B, *infra*, pp. 26–33.

STATEMENT

The relevant facts on the issue presented by this petition,[1] which are not in dispute, and as found by both courts below (R. 37a, 38a; Appendix A, *infra*, pp. 10, 13), may be summarized as follows:

The taxpayer is an attorney. During the years 1947 through 1950, inclusive, he failed to file any declaration of estimated tax. There was no reason-

[1] There were other issues involved in the Tax Court and Court of Appeals proceedings but these were decided in favor of the Commissioner. Accordingly, the facts relating to these other issues have not been included here.

able cause for such failures. The Commissioner, relying upon Section 294 (d) (1) (A) and Section 294 (d) (2) of the 1939 Code, respectively, imposed additions to the tax for each of the years involved for failure to file any declaration and also for substantial underestimation of the tax. (R. 37a, 38a; Appendix A, *infra*, pp. 10, 13.) The Tax Court sustained this action of the Commissioner. (R. 40a.) The Court of Appeals reversed as to the addition for substantial underestimation, holding that it could not be imposed concurrently with the addition for failure to file a declaration. (Appendix A, *infra*, pp. 14–18, 22–25.)

REASONS FOR GRANTING THE WRIT

1. The decision below, which involves an important issue affecting many taxpayers, is in direct conflict with rulings of the Third Circuit in *Abbott* v. *Commissioner*, 258 F. 2d 537, the Fifth Circuit in *Patchen* v. *Commissioner*, 258 F. 2d 544, and the Ninth Circuit in *Hansen* v. *Commissioner*, 258 F. 2d 585. See also *Kilborn* v. *Commissioner* (C. A. 5th), decided September 18, 1958 (58–2 U. S. T. C., par. 9847). There are no material factual differences in these cases, and the legal issue posed in each of them is the same.

Section 58 of the Internal Revenue Code of 1939 (Appendix B, *infra*, pp. 26–27) requires a taxpayer to file a declaration of estimated tax for the current year. Section 59 (Appendix B, *infra*, pp. 27–29) requires quarterly payments of the estimated tax. To

[2] This Court granted the Government's petition for a writ of certiorari in *Hansen* (October Term, 1958, No. 380) on November 10, 1958, with respect to the other issue involved in that case relating to the accruability of dealer reserve accounts.

enforce these provisions Section 294 (d) (1) (A) and (B) (Appendix B, *infra*, pp. 29–30) provides for an addition to the tax for failure to file a declaration *or* for failure to pay installments of the estimated tax declared. The additions under subparagraphs (A) and (B) are not to be imposed concurrently, and they may not be imposed where reasonable cause has been shown by the taxpayer. The maximum addition under these provisions is 10 per cent of the unpaid portion of the tax.

Section 294 (d) (2) (Appendix B, *infra*, pp. 30–31), on the other hand, provides for an addition to the tax for substantial underestimation,[3] and in the present case this latter addition consisted of 6 per cent of the amount by which the final tax exceeded the estimated tax.[4] Section 29.294–1 (b) (3) of Treasury Regulations 111 (Appendix B, *infra*, pp. 31–33) provides that, in the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of determining the addition to the tax for substantial underestimation shall be zero.

The decision below holds that this provision of the Regulation is invalid,[5] and that it cannot be sustained

[3] It is clear that the imposition of the addition for underestimation is not excusable for reasonable cause. *Kaltreider* v. *Commissioner*, 255 F. 2d 833, 839 (C. A. 3d); *Clark* v. *Commissioner*, 253 F. 2d 745, 751 (C. A. 3d).

[4] Section 294 (d) (2) also provides an alternative method of determining the addition for underestimation, *i. e.*, the amount by which 80 per cent of the final tax exceeds the estimated tax. The addition imposed upon a taxpayer is the lesser of these two alternatives.

[5] An identical provision is included in Section 39.294–1 (b) (3) (i) of Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939.

by the fact that it is substantially a quotation from the pertinent Congressional committee reports. The effect of this decision is that the additions for failure to file a declaration and for substantial underestimation are not to be applied concurrently and that there can be no underestimation where there has been no estimate made.

The decisions of the Third, Fifth, and Ninth Circuits, (*supra*, p. 3), on the other hand, support the Commissioner's position that the provisions of the Regulations are entirely valid because they are reasonable, are consistent with the statutory provisions, and are supported by the legislative history.[6] More-

[6] When Sections 58, 59 and 294 (d) were originally added to the 1939 Code by Section 5, Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, the Committee Reports indicate that the additions for failure to file a declaration and for substantial underestimation were considered to apply separately. S. Rep. No. 221, 78th Cong., 1st Sess., p. 42 (1943 Cum. Bull. 1314, 1345), and H. Conference Rep. No. 510, 78th Cong., 1st Sess., p. 56 (1943 Cum. Bull. 1351, 1372), state as follows:

"* * * In the event of a failure to file any declaration where one is due, the amount of the estimated tax for the purposes of this provision [addition to the tax for substantial underestimation] will be zero. * * *"

Section 29.294-1 (b) (3) of Treasury Regulations 111, *infra*, p. 33, approved September 5, 1944, adopted this language of the Committee Reports practically verbatim. Congress has amended and, in effect, re-enacted the statutory provisions in question several times since 1943. See Section 118 (a), Revenue Act of 1943, c. 63, 58 Stat. 21; Section 13 (a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231; Section 202 (a), Revenue Act of 1948, c. 168, 62 Stat. 110; Act of January 2, 1951, c. 1195, 64 Stat. 1136; Section 208 (d) (4), Social Security Act Amendments of 1950, c. 809, 64 Stat. 477; Section 221 (g), Revenue Act of 1950, c. 994, 64 Stat. 906; Section 103 (b), Revenue Act of 1951, c. 521,

over, the Tax Court has consistently upheld the Commissioner's position and has sustained the Regulations.[7] Also, some District Courts have upheld the Regulations,[8] although other District Courts have held to the contrary.[9]

2. As the opinion below recognizes (Appendix A, *infra*, p. 15), the issue presented is an important one

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65 Stat. 152. In none of these instances has Congress indicated its disapproval of the above provision of the Regulations.

[7] For example, see *Fuller* v. *Commissioner*, 20 T. C. 308, affirmed on other grounds, 213 F. 2d 102 (C. A. 10th); *Hartley* v. *Commissioner*, 23 T. C. 353, modified, 23 T. C. 564; *Rictor* v. *Commissioner*, 26 T. C. 913; *Maxey* v. *Commissioner*, 26 T. C. 992, 996; *Skarda* v. *Commissioner*, 27 T. C. 137; *Romer* v. *Commissioner*, 28 T. C. 1228, 1255; *Marbut* v. *Commissioner*, 28 T. C. 687, 692; *Dalsanter* v. *Commissioner*, 28 T. C. 845, currently pending in the Sixth Circuit; *Spichel* v. *Commissioner*, 28 T. C. 938; *Garsgal* v. *Commissioner*, 28 T. C. 1086; *Hickerson* v. *Commissioner*, 29 T. C. 864; *Voloudakis* v. *Commissioner*, 29 T. C. 1101, currently pending in the Ninth Circuit; *Shippee* v. *Commissioner*, 30 T. C. No. 69; *Payne* v. *Commissioner*, 30 T. C. No. 111; *Irby* v. *Commissioner*, 30 T. C. No. 123; *Bilsky* v. *Commissioner*, 31 T. C. No. 6; *King* v. *Commissioner*, 31 T. C. No. 15.

[8] These include *Peterson* v. *United States*, 141 F. Supp. 382 (S. D. Tex.); *Farrow* v. *United States*, 150 F. Supp. 581 (S. D. Calif.); *Palmisano* v. *United States*, 159 F. Supp. 98 (E. D. La.), currently pending in the Fifth Circuit; *Echols* v. *Tomlinson* (S. D. Fla.), decided August 5, 1958 (2 A. F. T. R. 2d 5197), currently pending in the Fifth Circuit.

[9] See, for example, *United States* v. *Ridley*, 120 F. Supp. 530 (N. D. Ga.); *Owen* v. *United States*, 134 F. Supp. 31 (Neb.), appeal dismissed, 232 F. 2d 894 (C. A. 8th); *Jones* v. *Wood*, 151 F. Supp. 678 (Ariz.); *Powell* v. *Granquist*, 146 F. Supp. 308 (Ore.), affirmed on other issues, 252 F. 2d 56 (C. A. 9th); *Stenzel* v. *United States*, 150 F. Supp. 364 (N. D. Calif.); *Witt* v. *Tomlinson* (S. D. Fla.), decided March 24, 1958 (58-1 U. S. T. C., par. 9437), currently pending in the Fifth Circuit; *Wood* v. *United States*, 163 F. Supp. 426 (E. D. Tex.); *Barnwell* v. *United States*, 164 F. Supp. 430 (E. D. S. C.).

affecting many taxpayers, notwithstanding changes made by the Internal Revenue Code of 1954.[10] The Internal Revenue Service estimates that at the present time there are pending 3,800 cases involving more than $10,000,000 which raise this issue under the 1939 Code. Some of these cases are currently in litigation.[11] In the circumstances, resolution of this

[10] The 1954 Code eliminates the separate additions for failure to file the declaration or pay the estimated tax and for substantial underestimation of the estimated tax (Section 6651 (e) (26 U. S. C. 1952 ed., Supp. V, Sec. 6651 (e)). The 1954 Code provides for a single addition for underpayment of the estimated tax at the rate of 6 per cent of the amount of the underpayment (Section 6654 (26 U. S. C. 1952 ed., Supp. V, Sec. 6654)). It is noteworthy that, in explaining this change, the Committee Reports pertaining to the 1954 Code point out that under the 1939 Code additions for failure to file a declaration and for substantial underestimation would both apply concurrently, stating as follows (H. Rep. No. 1337, 83d Cong., 2d Sess., p. 40 (3 U. S. C. Cong. & Adm. News (1954) 4017, 4127); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 135 (3 U. S. C. Cong. & Adm. News (1954) 4621, 4769)):

"* * * This charge [for substantial underestimation] and the charge for failure to file a declaration or pay an installment of estimated tax may run concurrently and result in a combined charge of 15 percent of the estimated tax due."

[11] Tax Court decisions which uphold the Commissioner's position and which are currently on appeal include the following: *Neil* v. *Commissioner*, decided May 16, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,088), and *Cassell* v. *Commissioner*, decided April 7, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,054), which are pending in the Fifth Circuit; *Delsanter* v. *Commissioner*, *supra*, *Harp* v. *Commissioner*, decided June 26, 1957 (1957 P-H T. C. Memorandum Decisions, par. 57,105), *Gudgel* v. *Commissioner*, decided May 12, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,083), and *McIntyre* v. *Commissioner*, decided August 13, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,151), which are pending in the Sixth Circuit; and *Voloudakis* v. *Commissioner*, *supra*, and *Olshausen* v. *Commissioner*, decided May 13, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,085), which are pending in the Ninth Circuit.

District Court decisions which upheld the Commissioner's posi-

issue by this Court is important to both the Commissioner and taxpayers so that inequalities, depending on the jurisdiction in which the tax return was filed, may be avoided.

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tion and which are currently pending in the Fifth Circuit include *Palmisano* v. *United States*, *supra*, and *Echols* v. *Tomlinson*, *supra*. *Witt* v. *Tomlinson*, *supra*, which was decided in favor of the taxpayer is also currently pending in the Fifth Circuit.

Other current Tax Court decisions in which the appeal period has not run include the following: *Gladstone* v. *Commissioner*, opinion dated September 15, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,167), and *Colabella* v. *Commissioner*, opinion dated July 15, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,136), the venue of which would lie in the Second Circuit; *Irby* v. *Commissioner*, *supra*; *Carter* v. *Commissioner*, opinion dated August 29, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,166); *McKim* v. *Commissioner*, opinion dated August 13, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,154); *Pippa* v. *Commissioner*, *supra*; and *Shippen* v. *Commissioner*, *supra*, the venue of which would lie in the Fifth Circuit; *Turner* v. *Commissioner*, opinion dated September 30, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,181), the venue of which would lie in the Sixth Circuit; *Ebner* v. *Commissioner*, opinion dated June 9, 1958 (1958 P-H T. C. Memorandum Decisions, par. 58,108), the venue of which would lie in the Seventh Circuit; *Bilsky* v. *Commissioner*, *supra*, the venue of which would lie in the Eighth Circuit; and *King* v. *Commissioner*, *supra*, the venue of which would lie in the Ninth Circuit.

Other cases which are currently pending in the District Courts include the following: *Davies* v. *United States* (Mass.); *Macken* v. *Hoffman* (E. D. N. Y.); *National Bank of Westchester, White Plains* v. *United States* (S. D. N. Y.); *Miller* v. *United States* (W. D. N. Y.); *Griffin* v. *Dudley* (W. D. Pa.); *Eagen* v. *United States* (W. D. S. C.); *Lister* v. *United States* (N. D. Ga.); *Jones* v. *United States* (M. D. Ga.); *Peacock* v. *United States* (S. D. Ga.); *Dean* v. *United States* (S. D. Ga.); *Sami* v. *United States* (S. D. Fla.); *Tompkins* v. *Tomlinson* (S. D. Fla.); *Waddell* v. *Tomlinson* (S. D. Fla.); *LeBlanc* v. *United States* (E. D. La.); *Gray* v. *United States* (W. D. Tex.); *Edwards* v. *Looker* (S. D. Ohio); *Reed* v. *United States* (S. D. Ind.); *Carey* v. *United States* (E. D. Ill.); *Toly* v. *United States* (E. D. Wash.); *Nash* v. *Gran-*

CONCLUSION

There is a direct conflict among the circuits, and the question, involving the validity of a Treasury Regulation, is one of substantial importance. In these circumstances, apart from the merits of the decision below, review by this Court appears to be warranted.

Respectfully submitted.

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DECEMBER 1958.

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quist (Ore.); *Calley* v. *United States* (Ariz.); *Benson* v. *United States* (Ariz.); *Russell* v. *United States* (Kansas); *Smith* v. *United States* (Colo.); *Gentry* v. *Vidal* (N. Mex.).

APPENDIX A

United States Court of Appeals for the Sixth Circuit

No. 13320

FRED N. ACKER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

Decided June 18, 1958

Filed June 18, 1958. Carl W. Reuss, Clerk.

Before SIMONS, Chief Judge; MILLER, Circuit Judge, and MATHES, District Judge.

MATHES, District Judge: The Tax Court sustained *in toto* respondent's determinations of deficiencies in petitioner's income tax and additions thereto under Int. Rev. Code of 1939 §§ 291 (a), 294 (d) (1) (A), and 294 (d) (2) for the years 1947-1950 inclusive.

Petitioner does not question here the correctness of the additions to tax under § 291 (a); but challenges the validity of all the deficiency determinations and additions to tax under §§ 294 (d) (1) (A) and 294 (d) (2) for each of the years involved.

The facts, as set out in the Tax Court's Memorandum Findings of Fact and Opinion [16 CCH Tax Ct. Memo. 89 (1957)], are not in controversy. Petitioner is an attorney and a resident of Ohio. During

the relevant period petitioner was a stockholder, in some instances the sole stockholder, in several corporations. All but one of the deficiency determinations in issue upon this review concern activities of petitioner with respect to one or more of those corporations.

Petitioner not only disputes the correctness of the Tax Court's application of the Code sections involved; he also attacks the constitutionality in general of the income tax provisions of the Internal Revenue Code of 1939, and the constitutionality in particular of the requirement that a declaration of estimated tax be filed.

Inasmuch as the constitutional issues need not be reached if, as petitioner contends, the Tax Court incorrectly interpreted and applied the pertinent sections of the Internal Revenue Code of 1939, we turn first to the statutory questions. [See: *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–575 (1947); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341, 345–348 (1936) (concurring opinion of Mr. Justice Brandeis).]

In 1947, 1948, and 1949, petitioner personally paid real estate taxes on Ohio property owned by a corporation which in turn was wholly owned by him. Petitioner admits that title was kept in the corporation solely for his own convenience, that the property taxes were assessed against the corporation, and that within the period in question the corporation transacted business by selling some of the property. The Tax Court was clearly correct in sustaining respondent's determination that under the circumstances the property taxes were not deductible by petitioner. [Int. Rev. Code of 1939, § 23 (c) (1); Treasury Regulation 111 § 29.23 (c)–1, 26 C. F. R. (1949); *Moline Properties, Inc.* v. *Commissioner*, 319 U. S.

436 (1943); *Magruder* v. *Supplee*, 316 U. S. 394 (1942); *Gilken Corp.* v. *Commissioner*, 176 F. (2d) 141 (6th Cir. 1949); *Bradno* v. *Commissioner*, 138 F. (2d) 779 (6th Cir. 1943); and see *Simon J. Murphy Co.* v. *Commissioner*, 231 F. (2d) 639 (6th Cir. 1956).]

In 1950 petitioner was convicted and imprisoned for willful failure to file an income tax return for 1946. In his unsuccessful defense of this criminal prosecution petitioner expended $2,290 for legal expenses and bond costs which he urges are deductible, apparently under Int. Rev. Code of 1939, § 23 (a), on the theory that defending against criminal charges is "an absolute necessity" for an attorney and that his fight in the criminal case greatly enhanced his reputation. The Tax Court properly sustained respondent's disallowance of this deduction. "A taxpayer who has been prosecuted under a federal or state statute and convicted of a crime has not been permitted a tax deduction for his attorney's fee." [*Commissioner* v. *Heininger*, 320 U. S. 467, 473 n. 8 (1943); *Estate of Albert E. MacCrone*, 14 CCH Tax Ct. Memo. 958 (1955), *aff'd, on this point and rev'd, on other grounds*, 240 F. (2d) 841 (4th Cir. 1956); see: *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U. S. 30 (1958); *Hoover Motor Express Co.* v. *United States*, 356 U. S. 38 (1958).]

In 1947 petitioner loaned $8,500 to a corporation in which he owned stock, and the loan became worthless during that year. In 1948 petitioner was required to pay a note which he had guaranteed for another corporation in which he owned stock, resulting in a $3,465.49 loss to him. Respondent determined that both of these losses were deductible only as non-business bad debts, required to be treated as short term capital losses [Int. Rev. Code of 1939, § 23 (k) (4)], and so subject to the amount limitation specified in

§ 117 (d) (2) of the Internal Revenue Code of 1939. The Tax Court found that petitioner failed to show that he was in the business of lending money to or guaranteeing the loans of corporations, and so sustained respondent's determinations. We agree. [Treasury Regulation 111 § 29.23 (k)–6, 26 C. F. R. (1949); *Putnam* v. *Commissioner*, 352 U. S. 82, 92–93 (1956); *Wheeler* v. *Commissioner*, 241 F. (2d) 883 (2d Cir. 1957); *Commissioner* v. *Schaefer*, 240 F. (2d) 381 (2d Cir. 1957); and see *McNeill* v. *Commissioner*, 251 F. (2d) 863, 866–867 (4th Cir. 1958).]

For the years 1947 through 1950 respondent imposed on petitioner and the Tax Court sustained additions to tax both under § 294 (d) (1) (A) for failure to file a declaration of estimated tax, and under § 294 (d) (2) for substantial underestimation of estimated tax. Petitioner does not rely on the statutory excuse of "reasonable cause and not * * * willful neglect" to justify his failure to file the declarations. Rather, he maintains that the statutory provisions requiring the filing of a declaration of estimated tax are unconstitutional because "the enumerated powers of the Congress do not include any power to compel a citizen to prophesy. It is beyond any human ability and therefore not a subject for Congressional intervention."

Since petitioner makes no attempt to establish the statutory excuse, the Tax Court correctly applied the statute in sustaining imposition of the additions to tax under § 294 (d) (1) (A) for failure to file the declarations of estimated tax. And we hold with the Tax Court that petitioner's attack upon the constitutionality of the provisions of the Internal Revenue Code of 1939 requiring the filing of a declaration of estimated tax, and imposing penalties for failure to file, is "wholly without merit." Such requirements are a **valid** exercise of the taxing power conferred

by Article 1, § 8, and the Sixteenth Amendment of the Constitution. [*Erwin* v. *Granquist*, 253 F. (2d) 26 (9th Cir. 1958); *Walker* v. *United States*, 240 F. (2d) 601 (5th Cir.), *cert. denied*, 354 U. S. 939 (1957).]

Petitioner next contends that imposition of concurrent penalties under §§ 294 (d) (1) (A) and 294 (d) (2) of the 1939 Code is without statutory warrant. The Tax Court held that petitioner's failure to file any estimate at all amounted to a zero estimate which, in turn, resulted in a substantial underestimate within the purview of § 294 (d) (2). This holding is in accord with Treasury Regulation 111 § 29.294–1 (b) (3) (i) [26 C. F. R. (1949)], and is supported by a long line of Tax Court decisions [see, among others: *Clarence F. Buckley*, 29 T. C. No. 50 (1957); *Marcel Garsaud*, 28 T. C. 1086, 1090 (1957); *Harold C. Marbut*, 28 T. C. 687, 692 (1957); *J. D. Abbott*, 28 T. C. 795, 808–809 (1957); *Anthony Delsanter*, 28 T. C. 845, 861–862 (1957); *Walter H. Kaltreider*, 28 T. C. 121, 126 (1957); *Marvin Maxey*, 26 T. C. 992, 996 (1956); *Harry Hartley*, 23 T. C. 353, 360, *modified*, 23 T. C. 564 (1954); *G. E. Fuller*, 20 T. C. 308, 316 (1953), *aff'd., on other grounds*, 213 F. (2d) 102 (10th Cir. 1954)], and by some District Court decisions [*Palmisano* v. *United States*, 159 F. Supp. 98 (E. D. La. 1958); *Farrow* v. *United States*, 150 F. Supp. 581 (S. D. Cal. 1957); *Peterson* v. *United States*, 141 F. Supp. 382 (S. D. Tex. 1956)].

While this court has affirmed three Tax Court decisions which have sanctioned imposition of penalties under both § 294 (d) (1) (A) and § 294 (d) (2) where no declaration of estimated tax had been filed, examination of the briefs and appendices in these cases discloses that the propriety of imposing the penalty for substantial underestimation where no estimate at all

had been filed was not raised in this court. [*John Fedrika*, 14 CCH Tax Ct. Memo. 652, 658 (1955) *aff'd., per curiam*, 237 F. (2d) 916 (6th Cir. 1956), cert. denied, 352 U. S. 1025 (1957); *Robert Fogel*, 14 CCH Tax Ct. Memo. 718, 728 (1955), *aff'd., per curiam*, 237 F. (2d) 918 (6th Cir. 1956); *R. M. Clayton*, 15 CCH Tax Ct. Memo. 105, 109 (1956), *aff'd., per curiam*, 245 F. (2d) 238 (6th Cir. 1957).] The question remains open for examination then as *res integra* here.

Even though this problem of concurrent penalties exists only under the 1939 Code, and cannot arise under the 1954 Code which expressly provides but a single penalty for underpayment of estimated tax [Int. Rev. Code of 1954, §§ 6651 (*c*), 6654, and see 3 U. S. Code Cong. & Ad. News (1954) 4544, 4567, 5241–5242], the problem remains an important one because of cases yet to be decided which will be ruled by the 1939 Code [see Int. Rev. Code of 1954, § 6654 (h)].

The argument in support of the validity of that part of Treasury Regulation 111 § 29.294–1 (b) (3) (i) [26 C. F. R. (1949)] declaring that "[i]n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero," has been well stated in *Palmisano* v. *United States*, *supra*, 159 F. Supp. 98 and *Farrow* v. *United States*, *supra*, 150 F. Supp. 581. [See also *G. E. Fuller*, *supra*, 20 T. C. at 316.]

But to give effect to the quoted regulation presents a problem even greater than the logical difficulty encountered in saying that one who has filed no estimate at all has thereby underestimated his tax. [See *Barnwell* v. *United States*, 58–1 U. S. T. C. Par. 9374 (E. D. S. C. Feb. 4, 1958).] For although the Congress treated failure to file a declaration of estimated tax and substantial underestimation of tax as separate and distinct acts under the 1939 Code, and provided sepa-

rate and different penalties for each, the regulation renders a taxpayer who has failed to file a declaration ipso facto subject to both the penalty for failure to file and the penalty for substantial underestimation. As the Tax Court itself observed in rebuffing another attempt of respondent to extend these penalties by implication: "If the legislature had intended such a result it would have had been a simple matter so to provide." [*Anthony Delsanter, supra*, 28 T. C. at 862.]

Moreover, inasmuch as the regulation imposes a penalty in addition to one expressly imposed by the statute itself for the same omission, we are unable to perceive wherein the regulation is necessary to effectuate the statutory taxing scheme. Section 294 (d) of the Internal Revenue Code of 1939 is penal in nature and to be strictly construed. [*Stephan* v. *Commissioner*, 197 F. (2d) 712 (5th Cir. 1952); *Barnwell* v. *United States*, *supra*, 58–1 U. S. T. C. Par. 9374; *Davis* v. *Dudley*, 124 F. Supp. 426, 429 (W. D. Pa. 1954); see *F. C. C.* v. *American Broadcasting Co.*, 347 U. S. 284, 296 (1954).] "Penalties are never extended by implication" [*Elliott* v. *Railroad Co.*, 99 U. S. 573, 576 (1878); *United States* v. *J. H. Winchester & Co.*, 40 F. (2d) 472 (2d Cir. 1930)], and "all questions in doubt must be resolved in favor of those from whom the penalty is sought." [*Hatfried, Inc.* v. *Commissioner*, 162 F. (2d) 628, 633 (3rd Cir. 1947).]

Furthermore, even if the exactions involved be treated as "additions to Tax," as they are denominated by § 294 of the 1939 Code, the regulation runs counter to the long established rule that "statutes levying taxes . . . are not to be extended by implication beyond the clear import of the language used." [*United States* v. *Merriam*, 263 U. S. 179, 187–188 (1923); *Crooks* v. *Harrelson*, 282 U. S. 55, 61 (1930); *Reinecke* v. *Gardner*, 277 U. S. 239, 244 (1928); *Gould* v. *Gould*,

245 U. S. 151, 153 (1917); *cf. Parker Pen Co. v. O'Day*, 234 F. (2d) 607, 609 (7th Cir. 1956).]

Mindful of the cogent reasoning of the Tax Court and District Court opinions sustaining the regulation, we nevertheless are of opinion that Treasury Regulation 111 § 29.294–1 (b) (3) (i) [26 C. F. R. (1949)] is invalid insofar as it provides that "[i]n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero." In so holding we are mindful too that, as the Tax Court and the District Courts have pointed out, Treasury regulations are presumptively valid. But we think that in this instance considerations of reason and policy involved in construing statutes levying taxes and imposing penalties outweigh the presumption of validity; that the quoted provision of the regulation is, in other words, "unreasonable and plainly inconsistent with the revenue [statute]," and so cannot be sustained. [*Commissioner v. South Texas Lumber Co.*, 333 U. S. 496, 501 (1948).]

This conclusion is buttressed by the fact that it is in accord with that reached by the majority of the District Courts which have considered the problem. [*Barnwell v. United States, supra*, 58–1 U. S. T. C. Par. 9374; *Erwin v. Granquist*, 57–2 U. S. T. C. Par. 9732 (D. Ore. 1957), *aff'd.*, 253 F. (2d) 26 (9th Cir. 1958); *Powell v. Granquist*, 146 F. Supp. 308, 312 (D. Ore. 1956), *aff'd.*, 252 F. (2d) 56 (9th Cir. 1958); *Jones v. Wood*, 151 F. Supp. 678 (D. Ariz. 1956); *Stenzel v. United States*, 150 F. Supp. 364 (N. D. Cal. 1957); *Hodgkinson v. United States*, 57–1 U. S. T. C. Par. 9294 (S. D. Cal. 1956); *Owen v. United States*, 134 F. Supp. 31, 39 (D. Neb. 1955), *modified on another point sub nom. Knop v. United States*, 234 F. (2d) 760 (8th Cir. 1956); *Todd v. United States*, 57–2

U. S. T. C. Par. 9768 (N. D. Ga. 1957); *Glass* v. *Dunn*, 56-2 U. S. T. C. Par. 9840 (N. D. Ga. 1956); *United States* v. *Ridley*, 127 F. Supp. 3, 11 (N. D. Ga. 1954); *United States* v. *Ridley*, 120 F. Supp. 530, 538 (N. D. Ga. 1954).]

The judgment of the Tax Court must therefore be reversed as to the additions to tax under § 292 (d)(2). However, our conclusion that the claimed deductions were properly disallowed compels us nonetheless to reach the constitutional issues raised as to the income tax provisions of the Internal Revenue Code of 1939.

Petitioner asserts that these income tax provisions are unconstitutional because: (1) the rates are so high as to make the levy not a tax but a confiscation of property contrary to the Fifth Amendment to the Constitution, (2) the progressive rates are unconstitutional, and (3) the "income tax law considered as a whole in its excessive rates and arbitrary provisions is openly subversive of the fundamental philosophy of the Constitution of the United States and repugnant to its continued existence."

The Tax Court summarily disposed of these constitutional issues with the statement: "It has long been recognized that where a taxing statute is within the power of Congress to enact, as clearly the Internal Revenue Code is, the fact that the rates provided thereunder may be excessive, confiscatory, or destructive does does not invalidate the taxing act." [16 CCH Tax Ct. Memo. at 91.]

This declaration by the Tax Court completely overlooks petitioner's arguments by assuming the very thing that he disputes, namely, whether the Congress has the power to enact an income tax law like that found in the Internal Revenue Code of 1939.

While holding that the courts may not disturb the judgment of the Congress because of indirect effects

of a statute that clearly represents an exercise of the taxing power [see, for example, *McCray* v. *United States*, 195 U. S. 27 (1904)], on more than one occasion the Supreme Court has adverted to the possibility that a law, although denominated a taxing statute, might not be a taxing statute at all, but one which on its face has crossed the boundary from the classification "tax" to the classification "taking," so as to become subject to the limitations of the Fifth Amendment to the Constitution. [*Steward Machine Co.* v. *Davis*, 301 U. S. 548, 585 (1937); *Brushaber* v. *Union Pacific* R. R., 240 U. S. 1, 24 (1916).]

We know of no authority holding that the Congress may constitutionally enact a law which, although called a tax statute, on its face amounts to a taking of private property without compensation therefor. That such a law would fall within the area of "taking," rather than the area of "taxing," and so be subject to judicial nullification because of the limitations of the Fifth Amendment was clearly recognized by Mr. Chief Justice White speaking for the Court in *Brushaber* v. *Union Pacific R. R.*, *supra*, 240 U. S. 1, where he pointed out that, despite the breadth of the taxing power conferred by the Constitution, there might arise "a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." [240 U. S. at 24-25.]

This principle was also recognized by Mr. Justice Cardozo speaking for the Court in *Steward Machine*

Co. v. *Davis*, *supra*, 301 U. S. 548, when he wrote: "[W]e assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." [301 U. S. at 585.] Nor do we forget the ringing words of Mr. Justice Holmes when, in dissent, he declared: "The power to tax is not the power to destroy while this Court sits." [*Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, 223 (1928).]

Since the Tax Court applied an incorrect legal standard in judging petitioner's claim of unconstitutionality, it would be proper to remand the case to enable that court to weigh the evidence in light of correct legal standards. However, on surveying the entire record from which it appears that petitioner fully presented to the Tax Court both his constitutional arguments and his evidence supporting them, we think there is no reasonable basis in fact or law for a holding that the income tax provisions of the Internal Revenue Code of 1939 are unconstitutional either on their face or as applied to petitioner in this case.

The 1939 Code is unquestionably a taxing statute in substance as well as in name. The constitutionality of progressive tax rates is long settled. [*Knowlton* v. *Moore*, 178 U. S. 41 (1900); *Brushaber* v. *Union Pacific R. R.*, *supra*, 240 U. S. 1.] The classifications drawn in question here do not appear to be either arbitrary or unreasonable in any constitutional sense. To the contrary, in large part they represent "the record of the Government's endeavor to keep pace with the fertility of invention whereby taxpayers had contrived to keep the larger benefits of ownership and be relieved of the attendant burdens." [*Burnet* v. *Wells*, 289 U. S. 670, 676 (1933).]

Nor can we say that the rates of tax, admittedly high, have reached confiscation or a "taking" in the constitutional sense. All in all, much as we may as men sympathize with petitioner's arguments about our tax plight, as judges we must say that he has addressed them to the wrong forum: they are for the Congress, and not for the courts.

For the reasons stated, the judgment of the Tax Court is reversed insofar as it sustains the additions to tax under § 292 (d) (2) of the Internal Revenue Code of 1939. In all other respects, the judgment is affirmed.

Judgment

Filed June 18, 1958

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby reversed insofar as it sustains the additions to tax under § 294 (d) (2) of the Internal Revenue Code of 1939. In all other respects, the judgment is affirmed.

United States Court of Appeals for the Sixth Circuit

No. 13,320

FRED N. ACKER, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ORDER ON PETITIONS FOR REHEARING

Filed September 3, 1958

Filed September 3, 1958. Carl W. Reuss, Clerk.

PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

Before: SIMONS, Chief Judge, MILLER, Circuit Judge, and MATHES, District Judge.

PER CURIAM.

Each party has petitioned for a rehearing. Petitioner but restates a portion of his earlier argument.

Respondent, however, now advances the contention that "the Treasury Regulation in question could hardly be inconsistent with the statute * * * because the language of the Treasury Regulation is almost identical to the language used by Congress in the Committee Reports dealing with the statute." [Compare Treasury Regulation 111 § 29.294–1 (b) (3) (i), 26 C. F. R. (1949) with S. Rep. No. 221, 78th Cong., 1st Sess. 12 (1943 Cum. Bull. 1314, 1325), and H. R. Rep. No. 510, 78th Cong., 1st Sess. 56 (1943 Cum. Bull. 1351, 1372).]

Respondent also calls to our attention the recent decisions of *Patchen* v. *Commissioner*, * * * F. 2d * * * (5th Cir., July 23, 1958), *Abbott* v. *Commissioner*, * * * F. 2d * * * (3rd Cir., July 31, 1958), and *Hanson* v. *Commissioner*, * * * F. 2d * * * (9th Cir., Aug. 4, 1958). These decisions, rendered subsequent to the publication of our opinion in this case, express disagreement with our holding that the penalty for failure to file a declaration of estimated tax [Int. Rev. Code of 1939 § 294 (d) (1) (A)] and the penalty for substantial underestimation of estimated tax [*id.* § 294 (d) (2)] cannot be imposed concurrently so as to work the exaction of a double penalty.

In the *Patchen* case the learned Court of Appeals for the Fifth Circuit appears to credit as authority decisions of this Court in which the problem was never raised. [See footnote 15 citing *Fogel* v. *Commissioner*, 237 F. 2d 918 (6th Cir. 1956) and *Clayton* v. *Commissioner*, 245 F. 2d 238 (6th Cir. 1957). See also 3 Roehmer, Federal Taxation Par. 153 at page 191 (Aug. 8, 1958).]

In the *Abbott* case the learned Court of Appeals for the Third Circuit recognizes that: "An examination of the underestimation provisions of Section 294 (d) (2), taken alone, leaves unanswered the question of whether the penalty provided should be imposed where no declaration of estimated tax is filed." [*Abbott* v. *Commissioner*, *supra*, * * * F. 2d at * * *] The Court then observed that "[t]he statute being ambiguous, resort to legislative history is proper in an endeavor to ascertain Congressional intent" [*ibid.*]; and concluded from the legislative history that the Congress intended the double penalty since "the regulation is precisely in accord with the Congressional intent expressed in the conference report." [*Ibid.*]

In the *Hausen* case the learned Court of Appeals for the Ninth Circuit likewise concluded from the legislative history that "[n]o other conclusion is possible but that Congress intended" to provide in the Act for the double penalty. [*Hausen* v. *Commissioner*, *supra*, * * * F. 2d at * * *]

However, it has long been our view that "[such an] intention of the Congress must be gathered from the language of the Act. * * *" [*United States* v. *Stroop*, 109 F. 2d 891, 893 (6th Cir. 1940); see also *Hopkins* v. *Commissioner*, 144 F. 2d 683, 692 (6th Cir. 1944).]

"Further", as the Court of Appeals for the Third Circuit has pointed out on another occasion, "it is well-settled that in the application of penalties, 'all questions in doubt must be resolved in favor of those from whom the penalty is sought.'" [*Hatfried, Inc.* v. *Commissioner*, 162 F. 2d 628, 633 (3rd Cir. 1947).]

While our great respect for the learning and acumen of the Courts of Appeals for the Third, Fifth, and Ninth Circuits naturally gives us pause, we are nonetheless of opinion that the challenged regulation authorizing imposition of double penalties cannot be validated by the fact that it is substantially a quotation from the Congressional committee reports.

It seems to us a policy of first order that taxpayers under this "government of laws and not of men" be entitled to expect that whenever the Congress intends to exact a penalty for a particular omission, this will be done by unequivocal language embodied in a statute regularly enacted conformably to the Constitution, and not by a committee report that is neither voted on by the members of both Houses nor submitted to the President for his approval. [U. S. Const. Art I, §§ 7, 8, clause 1; Amend. XVI; see: *Langstaff* v. *Lucas*, 9 F. 2d 691, 692–693 (W. D. Ky. 1925), *aff'd upon the opinion of the District Court*, 13 F. 2d 1022 (6th

Cir.), *cert. denied*, 273 U. S. 721 (1926); *Masonite Corp.* v. *Fly*, 194 F. 2d 257, 260 (5th Cir. 1952); *Helvering* v. *Robsamen Motors, Inc.*, 128 F. 2d 584, 587-588 (8th Cir. 1942).]

Especially is this so where, as in the case at bar, the penalty sought to be imposed by administrative regulation is cumulative with and in addition to another penalty clearly and expressly imposed by the statute for the identical omission. Such a regulation is an attempted expansion and extension of the statute tantamount to an amendment thereof, and neither "presumptions of validity" nor "reenactment doctrines" can serve to validate it. [*United States* v. *Calamaro*, 354 U. S. 351, 358-359 (1957); *Koshland* v. *Helvering*, 298 U. S. 441, 446-447 (1936); *Manhattan Gen. Equip. Co.* v. *Commissioner*, 297 U. S. 129, 134-135 (1936); *Lincoln Elec. Co. Employees' Profit Sharing Trust* v. *Commissioner*, 190 F. 2d 326, 330 (6th Cir. 1951); *Langstaff* v. *Lucas*, *supra*, 9 F. 2d at 692-693; see *United States* v. *Abrams*, 197 F. 2d 803, 805 (6th Cir.), cert. denied, 344 U. S. 855 (1952).]

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law:" [*Morrill* v. *Jones*, 106 U. S. 466, 467 (1882).]

Each of the petitions for rehearing is denied.

APPENDIX B

Internal Revenue Code of 1939:

SEC. 58 [as amended by the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, Sec. 5 (a); Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, Sec. 13 (a); and Revenue Act of 1948, c. 168, 62 Stat. 110, Sec. 202 (a)].

DECLARATION OF ESTIMATED TAX BY INDIVIDUALS.

(a) *Requirement of Declaration.*—Every individual (other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621 (a), withholding under Subchapter D of Chapter 9 is not made applicable) shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year if—

(1) his gross income from wages (as defined in section 1621) can reasonably be expected to exceed the sum of $4,500[1] plus $600 with respect to each exemption provided in section 25 (b); or

(2) his gross income from sources other than wages (as defined in section 1621) can reasonably be expected to exceed $100 for the taxable year and his gross income to be $600 or more.

(b) *Contents of Declaration.*—In the declaration required under subsection (a) the individual shall state—

(1) the amount which he estimates as the amount of tax under this chapter for the taxable year, without regard to any credits under sections 32 and 35 for taxes withheld at source;

(2) the amount which he estimates as the

[1] Prior to the amendment by Section 202 (a) of the Revenue Act of 1948, *supra*, this amount was $5,000.

credits for the taxable year under sections 32 and 35; and

(3) the excess of the amount estimated under paragraph (1) over the amount estimated under paragraph (2), which excess for the purposes of this chapter shall be considered the estimated tax for the taxable year.

The declaration shall also contain such other information for the purposes of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, may by regulations prescribe, and shall contain or be verified by a written statement that it is made under the penalties of perjury.

* * * * *

(26 U. S. C. 1952 ed., Sec. 58.)

SEC. 59 [as added by the Current Tax Payment Act of 1943, *supra*, Sec. 5 (a), and amended by Individual Income Tax Act of 1944, *supra*, Sec. 13 (a)]. PAYMENT OF ESTIMATED TAX.

(a) *In General.*—The estimated tax shall be paid as follows:

(1) If the declaration is filed on or before March 15 of the taxable year, the estimated tax shall be paid in four equal installments. The first installment shall be paid at the time of the filing of the declaration, the second and third on June 15 and September 15, respectively, of the taxable year, and the fourth on January 15 of the succeeding taxable year.

(2) If the declaration is filed after March 15 and not after June 15 of the taxable year, and is not required by section 58 (d) to be filed on or before March 15 of the taxable year, the estimated tax shall be paid in three equal installments. The first installment shall be paid at the time of the filing of the declaration, the second on September 15 of the taxable year, and the third on January 15 of the succeeding taxable year.

(3) If the declaration is filed after June 15 and not after September 15 of the taxable year, and is not required by section 58 (d) to be filed on or before June 15 of the taxable year, the estimated tax shall be paid in two equal installments. The first installment shall be paid at the time of the filing of the declaration, and the second on January 15 of the succeeding taxable year.

(4) If the declaration is filed after September 15 of the taxable year, and is not required by section 58 (d) to be filed on or before September 15 of the taxable year, the estimated tax shall be paid in full at the time of the filing of the declaration.

(5) If the declaration is filed after the time prescribed in section 58 (d) (including cases in which an extension of time for filing the declaration has been granted under section 58 (e)), paragraphs (2), (3), and (4) of this subsection shall not apply, and there shall be paid at the time of such filing all installments of estimated tax which would have been payable on or before such time if the declaration had been filed within the time prescribed in section 58 (d), and the remaining installments shall be paid at the times at which, and in the amounts in which, they would have been payable if the declaration had been so filed.

(*b*) *Amendments of Declaration.*—If any amendment of a declaration is filed, the remaining installments, if any, shall be ratably increased or decreased, as the case may be, to reflect the increase or decrease, as the case may be, in the estimated tax by reason of such amendment, and if any amendment is made after September 15 of the taxable year, any increase in the estimated tax by reason thereof shall be paid at the time of making such amendment.

(*c*) *Installments Paid in Advance.*—At the election of the individual, any installment of

the estimated tax may be paid prior to the date prescribed for its payment.

(d) *Payment as Part of Tax for Taxable Year.*—Payment of the estimated tax, or any installment thereof, shall be considered payment on account of the tax for the taxable year. Assessment in respect of the estimated tax shall be limited to the amount paid.

(26 U. S. C. 1952 ed., Sec. 59.)

SEC. 294 [As amended by Section 118 (a), Revenue Act of 1943, c. 63, 58 Stat. 21, Sections 6 (b) (8), and 13 (b) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231]. ADDITIONS TO THE TAX IN CASE OF NON-PAYMENT.

* * * * *

(d) *Estimated Tax.*—

(1) *Failure to file declaration or pay installment of estimated tax.*—

(A) *Failure to File Declaration.*—In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credit under sections 32 and 35.

(B) *Failure To Pay Installments of Estimated Tax Declared.*—Where a declaration of estimated tax has been made and filed within the time prescribed, or where a declaration of estimated tax has been made and filed after the time prescribed and the Commissioner has found that failure to make and file such declaration within the time prescribed was due to reasonable cause and not to willful neglect, in the case of a failure to pay an installment of the estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of the unpaid amount to such installment, and in addition 1 per centum of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment.

(2) *Substantial underestimate of estimated tax.*—If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35), in the case of individuals other than farmers exercising an election under section 60 (a), or 66⅔ per centum of such tax so determined in the case of such farmers, exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. This paragraph shall not apply to the taxable year in which falls the death of the taxpayer, nor, under regulations prescribed by the Commissioner with the approval of the Secretary, shall it apply to the taxable year in which the taxpayer makes a timely pay-

ment of estimated tax within or before each quarter (excluding, in case the taxable year begins in 1943, any quarter beginning prior to July 1, 1943) of such year (or in the case of farmers exercising an election under section 60 (a), within the last quarter) in an amount at least as great as though computed (under such regulations) on the basis of the taxpayer's status with respect to the personal exemption and credit for dependents on the date of the filing of the declaration for such taxable year (or in the case of any such farmer, or in case the fifteenth day of the third month of the taxable year occurs after July 1, on July 1 of the taxable year) but otherwise on the basis of the facts shown on his return for the preceding taxable year. * * *

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(26 U. S. C. 1952 ed., Sec. 294.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.294–1 [As added by T. D. 5305, 1943 Cum. Bull. 260, and amended by T. D. 5403, 1944 Cum. Bull. 349, and T. D. 5420, 1944 Cum. Bull. 355] Additions to the tax.—(a) *General.*—

Section 294 (d) provides for certain additions to the tax in the case of—

(1) failure to file timely a declaration of estimated tax;

(2) failure to pay within the time prescribed any installment of declared estimated tax; and

(3) substantial underestimate of the estimated tax.

These additions to the tax are in addition to any applicable criminal penalties.

(b) *Additions for specific failures on the part of the taxpayer with respect to the estimated tax.*—(1) *Failure to file declaration.*—

Section 294 (d) (1) (A) provides for an addition to the tax in the case of a failure to make

and file a declaration of estimated tax within the time prescribed unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not due to willful neglect. Such addition to the tax shall be in an amount equal to 5 per cent of the unpaid amount of each installment and in addition 1 per cent of the unpaid amount of the installment for each month (except the first) or fraction thereof during which such amount remains unpaid. Such addition to the tax with respect to any installment due but unpaid shall not exceed 10 per cent of the unpaid portion of such installment. For the purposes of section 294 (d) (1) (A) the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits for tax withheld at source.

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(2) Failure to pay installment of declared estimated tax.—Section 294 (d) (1) (B) provides for an addition to the tax in the case of the failure to pay an installment of the declared estimated tax within the time prescribed unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not due to willful neglect. Such addition to the tax is applicable to delinquency in payment only (1) where a timely declaration of estimated tax has been made and filed or (2) where the Commissioner has found that the failure to make and file a timely declaration was due to reasonable cause and not to willful neglect. Such addition to the Tax shall be in an amount equal to 5 per cent of the unpaid amount of each installment of declared estimated tax and in addition 1 per cent of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. The addition to the tax is limited with

respect to any installment due but unpaid to 10 per cent of the unpaid portion of such installment. Such addition to the tax is not applicable in cases to which the addition to the tax under section 294 (d) (1) (A) applies.

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(3) *Substantial understatement of estimated tax.*—Section 294 (d) (2) provides for an addition to the tax in the case of a taxpayer who makes a substantial underestimate of tax on his declaration. Such addition to the tax shall not apply to the taxable year in which falls the death of the taxpayer.

For the taxable years beginning after December 31, 1942, except as hereinafter provided—

(A) In the case of individuals, other than those exercising the election under section 60 (a), relating to farmers, an addition to the tax under section 294 (d) (2) is applicable in the event that the amount of the estimated tax (increased by the amount of the credit for taxes withheld at source on wages and the credit under section 32) is less than 80 per cent of the tax imposed by Chapter 1 for the taxable year (determined without regard to such credits). In the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero.

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